

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

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6 MAY 08 2002

Michael N. Milby, Clerk

MARK NEWBY, ET AL.,

Plaintiff,

vs.

ENRON CORPORATION, ET AL.,

Defendants.

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CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED CASES

**MOTION FOR ENTRY OF PRELIMINARY SCHEDULING ORDER FOR
COMPLAINTS CONSOLIDATED INTO *NEWBY* AND PURSUED BY PERSONS
OTHER THAN COURT-APPOINTED LEAD PLAINTIFF**

THE HONORABLE JUDGE OF THIS COURT:

LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper (collectively, "Movants") move this Court for entry of a preliminary scheduling order to govern securities fraud complaints consolidated into this matter that may be pursued by persons in the future other than the Court-appointed Lead Plaintiff.¹

1. Pursuant to the Scheduling Order entered by the Court on February 28, 2002, as amended, a single consolidated securities fraud complaint was to be filed on April 8, 2002 by the

¹Counsel for Movants have been advised that the request for relief in this motion is likewise sought by the following persons or entities, who have been named as defendants in one or more of the cases consolidated into *Newby* or in one or more of the cases to be consolidated in this Court pursuant to orders entered by the Judicial Panel on Multidistrict Litigation: Arthur Andersen, LLP; Thomas Bauer; the Estate of J. Clifford Baxter, Deceased; Robert A. Belfer; Norman P. Blake, Jr.; Richard B. Buy; Debra Cash; Richard A. Causey; Ronnie C. Chan; John H. Duncan; Andrew S. Fastow; Paulo V. Ferraz Pereira; Joe H. Foy; Mark A. Frevert; D. Stephen Goddard; Gary Goolsby; Wendy L. Gramm; Joseph M. Hirko; Stanley C. Horton; Robert K. Jaedicke; Steven J. Kean; Mark E. Koenig; Kenneth Lay; Charles A. LeMaistre; LJM2 Co-Investment, L.P.; Rebecca Mark-Jusbasche; Michael S. McConnell; Jeffrey McMahon; John Mendelsohn; J. Mark Metts; Jerome J. Meyer; Kristina Mourdant; Ben Neuhausen; Michael C. Odom; Cindy K. Olson; Kenneth D. Rice; Frank Savage; Jeffrey K. Skilling; John Stewart; Joseph W. Sutton; Nancy Temple; John Wakeham; Charles E. Walker; Roger Willard; and Herbert S. Winokur, Jr.

Court-appointed Lead Plaintiff. Pursuant to the Scheduling Order and the Order appointing Lead Plaintiff and Lead Counsel, only this consolidated securities fraud complaint is the subject of motions to dismiss being filed on May 8, 2002. However, as the Court considers these motions to dismiss Lead Plaintiff's consolidated complaint, approximately 56 securities fraud matters consolidated to date into this case remain pending, several of which are not styled as class actions. In addition, pursuant to an order of the Judicial Panel on Multidistrict Litigation, 14 cases have been ordered transferred, and at least another 20 "tag-along" actions are likely to be transferred, to this Court for pretrial management. See Tab A, Transfer Order, Docket No. 1446, *In re Enron Corp. Securities, Derivative & 'ERISA' Litigation* (J.P.M.L. Apr. 16, 2002).² This motion seeks entry of a preliminary scheduling order with respect to these consolidated cases filed by persons or entities other than the Court-appointed Lead Plaintiff (referred to herein as "the Consolidated Claims").

2. This motion requests that the Court enter a preliminary scheduling order with respect to the Consolidated Claims, in the event that any of the plaintiffs that filed these actions are not ultimately represented by the Court-appointed Lead Plaintiff.³ In order to ensure efficient

²As the Court is aware, the MDL Transfer Order consolidates all pretrial proceedings in cases relating to "the financial collapse of Enron Corp." in this Court.

³It is at least conceivable that some securities fraud plaintiffs may not be ultimately represented by Lead Plaintiff and Lead Counsel. For example, the Court may dismiss the consolidated securities complaint filed by Lead Plaintiff. Even if the Court were not to dismiss the Lead Plaintiff's amended complaint, the Court might not ultimately certify a class as requested by Lead Plaintiff, or might certify one or more classes that exclude certain securities fraud plaintiffs. Finally, certain plaintiffs may choose to opt out of one or more classes certified in *Newby*. For example, the plaintiffs in *Investor Partner Life Ins. Co. v. Lay*, Civil Action No. H-02-1364, recently filed a request for clarification of, or, alternatively, objection to the order consolidating their claims into *Newby*, asserting that Lead Plaintiff's amended complaint does not adequately represent their interests. Additionally, Fleming & Associates (counsel in five lawsuits consolidated to date into *Newby*) have repeatedly stated that it intends to pursue claims on an individual, and not class, basis. Finally, Ralph Wilt, plaintiff in *Wilt v. Fastow*, Civil Action No. H-02-

and coordinated treatment of the Consolidated Claims before this Court, Movants request that this Court enter a preliminary scheduling order establishing deadlines for amended pleadings in the event that any persons or entities with Consolidated Claims decide to pursue their own claims independently of any class claims pursued by Lead Plaintiff. The preliminary scheduling order would apply to Consolidated Claims filed to date by persons or entities other than Lead Plaintiff and Lead Counsel, as well as claims that may be consolidated into this matter in the future, either by virtue of orders of consolidation entered by this Court or by virtue of orders entered by the Judicial Panel on Multidistrict Litigation. Movants respectfully suggest the following deadlines:

- (a) In the event the Lead Plaintiff's consolidated complaint is dismissed in its entirety, plaintiffs who still desire to pursue their Consolidated Claims would file amended pleadings within 30 days of the Court's order dismissing all claims.
- (b) In the event Lead Plaintiff's consolidated complaint survives, in whole or in part, the motions to dismiss, and the Court subsequently grants certification of any classes, persons or entities with Consolidated Claims who still desire to opt out of such classes and pursue their Consolidated Claims shall file any opt-out notice as may be required by Court-approved notice to those classes, and shall also file an amended complaint within 30 days after the Court's ruling on class certification.⁴
- (c) In the event the Consolidated Complaint survives, in whole or in part, the motions to dismiss, and class certification is denied as to any persons or entities with Consolidated Claims (or in the event that such persons or entities are not eligible to participate in any classes certified), such persons or entities who still desire to pursue Consolidated Claims shall file their amended complaints within 30 days after the Court's ruling on class certification.
- (d) In a manner consistent with that employed by the Court in its Scheduling Order with respect to Lead Plaintiff's consolidated complaint, Defendants would file

0576, has asserted through counsel that his claims remain extant, notwithstanding the consolidated pleading filed by Lead Counsel.

⁴Any amended complaints filed pursuant to this preliminary scheduling order would obviously need to take into account the Court's rulings with respect to the consolidated securities fraud complaint filed by Lead Plaintiff.

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their response to any such amended complaints 30 days after they are filed and served.

3. On December 12, 2001, the Court entered an order consolidating all actions, pending in the Southern District of Texas, involving or relating to the financial difficulties of Enron Corp. into one of three cases. Cases explicitly pleaded as securities fraud suits were consolidated into *Newby*. In issuing this Order, the Court found that consolidation was necessary “to avoid the unwarranted duplication of discovery and motion practice.” Order of Consolidation, Dec. 12, 2001, at 17 (Dkt. No. 17).

4. In addition to the cases brought by plaintiffs who sought appointment as Lead Counsel in *Newby* or as Lead Counsel of a subclass in *Newby*, the actions consolidated in *Newby* include so-called individual actions, brought by one or more plaintiffs predominately asserting claims facially based on Texas state law.⁵ These cases include *Odam v. Enron Corp.*, H-01-3948; *Rosen v. Fastow*, Civil Action No. H-02-199; *Pearson v. Fastow*, Civil Action No. H-02-0670; *Ahlich v. Arthur Andersen, L.L.P.*, Civil Action No. H-02-347; *Delgado v. Fastow*, Civil Action No. H-02-0673; *American Nat’l Ins. Co. v. Arthur Anderson, L.L.P.*, Civil Action No. G-02-0084, and *Wilt v. Fastow*, Civil Action No. H-02-0576.⁶ *Wilt* was filed based on allegations

⁵Pursuant to 15 U.S.C. § 78bb(f), this Court has the authority to dismiss with prejudice state law claims alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security or that the defendant used or employed any manipulative or deceptive device in connection with the purchase or sale of a covered security in covered class actions. See Memorandum and Order dated Feb. 4, 2002 at 21-22 (Dkt. No. 279).

⁶Motions to remand are pending for *Rosen*, *Ahlich*, *Pearson*, *Delgado*, and *American National*.

that diversity jurisdiction was present.⁷ The individual plaintiffs in these actions fall within the scope of the class identified in Lead Plaintiff's consolidated complaint.

5. On January 15, 2002, the Court entered an order requiring "the parties of each consolidated action [to] submit in their lead case a proposed pretrial scheduling order." Dkt. No. 179. Lead Plaintiff was the only plaintiff to file a proposed pretrial scheduling order for *Newby*. The proposals submitted by defendants and Lead Plaintiff all requested the filing of one consolidated complaint in this matter.

6. On February 15, 2002, the Court entered an order appointing the Regents of the University of California as Lead Plaintiff and its attorneys, Milberg Weiss Bershad & Lerach LLP, as Lead Counsel in *Newby*. Lead Counsel was instructed to "henceforth direct and coordinate the prosecution of this action on behalf of all Plaintiffs' counsel." Memorandum and Order dated Feb. 15, 2002 at 84 (Dkt. No. 294). The Court held:

it is centrally important to the litigants on both sides and to this Court, especially because there are so many parties involved and all are entitled to equal access to the evidence, that the discovery process not disintegrate into chaos and harassment. At the same time diligent and efficient prosecution of the causes of action must be encouraged. To accomplish such and to provide all parties with more information through discovery to flesh out, or perhaps even eliminate concerns regarding conflicts of interest, ***the Court believes that the litigation should proceed as a unified class with a strong Lead Plaintiff, at least until the time for class certification.*** At that point, if still appropriate or if newly appropriate, the parties may reurge or file new requests for subclasses and separate representatives.

⁷On or about April 1, 2002, an amended complaint was filed in *Wilt*, which added additional plaintiffs and defendants to the complaint previously filed in that consolidated case. Should this Court determine that the filing of this amended complaint in *Wilt* is contrary to the orders of this Court regarding the filing of one amended consolidated complaint, the *Wilt* amended complaint may be struck pursuant to the authority granted this Court. Movants understand that other parties are addressing this issue and join in that briefing.

Id. at 63 (emphasis added). Based on the orders issued by this Court, the cases consolidated into *Newby* have been consolidated for all purposes, including the filing of Lead Plaintiff's consolidated pleading, through at least the time for class certification.⁸

7. The MDL's Transfer Order names 14 additional out-of-District Enron-related cases to be sent to this Court for "coordinated or consolidated pretrial proceedings." Several parties have notified the MDL Panel of approximately 20 additional "tag-along" actions, which under MDL procedures should receive orders conditionally transferring them to this Court. The plaintiffs in these actions likewise fall within the scope of the class identified in Lead Plaintiff's consolidated complaint.

8. The Movants, as well as a number of other individuals and entities, have been named as defendants in one or more of the consolidated securities cases or MDL actions to be transferred to this Court, but not in Lead Plaintiff's consolidated complaint in this case.

9. Although no securities fraud plaintiff has objected to the Court's scheduling order requiring the filing of Lead Plaintiff's consolidated complaint, it is at least conceivable, as indicated above, that one or more individual securities fraud plaintiffs will seek to prosecute their claims on an individualized basis. Entering an order setting preliminary deadlines for the filing of amended pleadings and responses would serve the following purposes:

⁸As the Court is aware, in addition to the authority provided by 15 U.S.C. § 78u-4 for the filing of consolidated complaints in class actions, the Court has the authority, after ordering the consolidation of cases, to require the filing of consolidated complaints for use during pretrial stages of the litigation. *See, e.g., Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975).

- (a) It would allow this Court to continue its coordinated consideration of this matter as prosecuted by Court-appointed Lead Plaintiff and Lead Counsel, at least through the time of class certification.
- (b) It would clarify the rights of all parties and yet avoid needless duplication of effort. Any individually prosecuted claims, for example, could only be prosecuted in a manner consistent with the Court's rulings with respect to Lead Plaintiff's consolidated complaint and any rulings on class certification with respect to claims prosecuted by Lead Plaintiff and Lead Counsel.
- (c) It would handle any individually prosecuted claims in a manner consistent with that employed by the Court in its Scheduling Order with respect to the claims prosecuted by Lead Plaintiff and Lead Counsel.

WHEREFORE PREMISES CONSIDERED, Movants respectfully request that this Court enter a preliminary scheduling order for complaints in cases consolidated into *Newby* and filed by persons other than court-appointed Lead Counsel.

Respectfully submitted,

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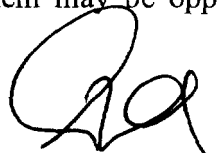
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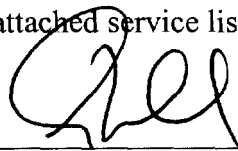
My efforts to confer with counsel representing various plaintiffs regarding the relief requested herein indicated that one or more of them may be opposed to the relief requested herein.



Eric J.R. Nichols

CERTIFICATE OF SERVICE

This pleading was served in compliance with the orders of this Court and Rule 5b of the Federal Rules of Civil Procedure on May 8, 2002 to all counsel. Additionally, it was served by United States First Class Mail to the persons on the attached service list.



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**SUPPLEMENT TO SERVICE LIST FOR MOTION FOR ENTRY OF
PRELIMINARY SCHEDULING ORDER**

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FILED
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DOCKET NO. 1446

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ENRON CORP. SECURITIES, DERIVATIVE & "ERISA" LITIGATION

**BEFORE WM. TERRELL HODGES,* CHAIRMAN, JOHN F. KEENAN,
MOREY L. SEAR, BRUCE M. SELYA, JULIA SMITH GIBBONS, D. LOWELL
JENSEN* AND J. FREDERICK MOTZ,* JUDGES OF THE PANEL**

TRANSFER ORDER

This litigation currently consists of the 54 actions listed on the attached Schedule A and pending in five districts as follows: 40 actions now consolidated into three actions in the Southern District of Texas, eleven actions in the Eastern District of Texas, and one action each in the Eastern District of Arkansas, the Southern District of California, and the Southern District of Florida.¹ Plaintiffs in two of the Eastern District of Texas actions move the Panel, pursuant to 28 U.S.C. § 1407, for centralization of the actions in the Eastern District of Texas for coordinated or consolidated pretrial proceedings. None of the parties now before the Panel opposes centralization. The only real dispute concerns selection of the transferee district. In addition to the Eastern District of Texas forum proffered by movants, the Southern District of Texas and the Western District of Oklahoma have been suggested by various respondents.

On the basis of the papers filed and hearing session held, the Panel finds that the actions in this litigation involve common questions of fact and that centralization in the Southern District of Texas will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All actions share factual questions concerning allegedly negligent and/or fraudulent conduct relating to the financial collapse of Enron Corp. (Enron). Whether the actions be brought by securities holders seeking relief under the federal securities laws, shareholders suing derivatively on behalf of Enron, or participants in Enron retirement savings plans suing for violations of the Employee Retirement Income Security Act of 1974, all actions can be expected to focus on a significant number of common events, defendants, and/or witnesses. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to questions of class certification), and conserve the resources of the parties, their counsel and the judiciary.

We are persuaded that this litigation has a strong Texas nexus and that the appropriate transferee forum for centralized pretrial proceedings is the Southern District of Texas. We note that i) many parties, witnesses and documents will be found in Houston, where Enron is headquartered and where Enron's

*Judges Hodges, Jensen and Motz took no part in the decision of this matter.

¹The motion before the Panel pertained to one additional Southern District of Texas action that has since been dismissed, *City of Birmingham Retirement and Relief Plan v. Enron Corp., et al.*, C.A. No. 4:01-3940. Accordingly, the question of Section 1407 transfer with respect to this action is moot. Additionally, the Panel has been notified of more than 40 potentially related actions now pending in federal district courts. In light of the Panel's disposition of this docket, these additional actions will be treated as potential tag-along actions. See Rules 7.4 and 7.5, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001).

auditors performed much of their audit work; ii) most of the actions have been brought in the Southern District of Texas, and the majority of responding MDL-1446 parties have expressed a preference for that forum; iii) proceedings are furthest advanced in S.D. Texas; and iv) a litigation of this scope will benefit from centralization in a major metropolitan center that is well served by major airlines, provides ample hotel and office accommodations, and offers a well developed support system for legal services.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A and pending outside the Southern District of Texas are transferred to the Southern District of Texas and, with the consent of that court, assigned to the Honorable Melinda Harmon for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A.

FOR THE PANEL:


John F. Keenan
Acting Chairman

SCHEDULE A

MDL-1446 -- In re Enron Corp. Securities, Derivative & "ERISA" Litigation

Eastern District of Arkansas

Stephen A. McIntyre v. Kenneth L. Lay, et al., C.A. No. 4:01-836

Southern District of California

Mark E. McKinney v. Enron Corp., et al., C.A. No. 3:01-2182

Southern District of Florida

Diana M. Perez v. Enron Corp., et al., C.A. No. 1:01-4951

Eastern District of Texas

David R. Wortham v. Enron Corp., et al., C.A. No. 5:01-299
David Trzebucki, et al. v. Andrew S. Fastow, et al., C.A. No. 5:01-308
Duane Mceachern v. Enron Corp., et al., C.A. No. 5:01-310
William E. Davis, et al. v. Enron Corp., et al., C.A. No. 5:01-313
John Anson v. Kenneth L. Lay, et al., C.A. No. 5:01-318
Leslie H. Duncan v. Kenneth L. Lay, et al., C.A. No. 5:01-319
John Barnett v. Kenneth L. Lay, et al., C.A. No. 5:01-320
Shelly Douglass v. Kenneth L. Lay, et al., C.A. No. 5:01-321
Stephen Phillips v. Kenneth L. Lay, et al., C.A. No. 5:01-322
Phil E. Parham, et al. v. Kenneth L. Lay, et al., C.A. No. 5:01-323
Lynn Goffman, et al. v. Robert A. Belfer, et al., C.A. No. 9:01-289

Southern District of Texas

Mark Newby, et al. v. Enron Corp., et al., C.A. No. 4:01-3624
Seth Abrams, et al. v. Enron Corp., et al., C.A. No. 4:01-3630
Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Kenneth L. Lay, et al.,
C.A. No. 4:01-3645
Robert J. Casey, II, et al. v. Enron Corp., et al., C.A. No. 4:01-3647
Frank Wilson v. Enron Corp., et al., C.A. No. 4:01-3652
J. Michael Gottesman v. Enron Corp., et al., C.A. No. 4:01-3660
Avigayil Greenberg v. Enron Corp., et al., C.A. No. 4:01-3670
Robert Christianson v. Enron Corp., et al., C.A. No. 4:01-3671
Ernest Gottdiener v. Enron Corp., et al., C.A. No. 4:01-3681

MDL-1446 Schedule A (Continued)

Southern District of Texas (Continued)

Muriel P. Kaufman, IRA v. Enron Corp., et al., C.A. No. 4:01-3682
John P. McCarthy Money Purchase Plan v. Enron Corp., et al., C.A. No. 4:01-3686
Joseph E. Kassoway, etc. v. Andrew S. Fastow, et al., C.A. No. 4:01-3690
Michael Koroluk v. Enron Corp., et al., C.A. No. 4:01-3733
James Brill v. Enron Corp., et al., C.A. No. 4:01-3734
Elmar A. Busch v. Enron Corp., et al., C.A. No. 4:01-3735
Warren Pinchuck v. Enron Corp., et al., C.A. No. 4:01-3736
Mahin S. Mashayekh v. Enron Corp., et al., C.A. No. 4:01-3737
Barbara D. Lee v. Enron Corp., et al., C.A. No. 4:01-3789
Danielle M. Karcich, et al. v. Enron Corp., et al., C.A. No. 4:01-3838
Naomi Raphael v. Enron Corp., et al., C.A. No. 4:01-3839
Victor Ronald Frangione v. Enron Corp., et al., C.A. No. 4:01-3889
Patricia D. Parsons v. Enron Corp., et al., C.A. No. 4:01-3903
Pamela M. Tittle, et al. v. Enron Corp., et al., C.A. No. 4:01-3913
John Odam, et al. v. Enron Corp., et al., C.A. No. 4:01-3914
Frank Anthony Cammarata, III v. Enron Corp., et al., C.A. No. 4:01-3993
Fred Greenberg v. Robert A. Belfer, et al., C.A. No. 4:01-3998
George Nicoud v. Enron Corp., et al., C.A. No. 4:01-4009
Roy E. Rinard, et al. v. Enron Corp., et al., C.A. No. 4:01-4060
Michael P. Harney v. Enron Corp., et al., C.A. No. 4:01-4063
Archdiocese of Milwaukee Supporting Fund, Inc. v. Enron Corp., et al.,
C.A. No. 4:01-4071
Gary W. Kemper, et al. v. Enron Corp., et al., C.A. No. 4:01-4089
Kenneth Franklin v. Enron Corp., et al., C.A. No. 4:01-4106
Enron Corp. Savings Plan v. Enron Corp., et al., C.A. No. 4:01-4108
Betty J. Clark v. Enron Corp., et al., C.A. No. 4:01-4125
Dorothy Ricketts v. Enron Corp., et al., C.A. No. 4:01-4128
Richard Pottratz, et al. v. Enron Corp., et al., C.A. No. 4:01-4150
Susan Copley v. Kenneth L. Lay, et al., C.A. No. 4:01-4168
James J. Daley, etc. v. Enron Corp., et al., C.A. No. 4:01-4189
Amalgamated Bank, etc. v. Kenneth L. Lay, et al., C.A. No. 4:01-4198
Catherine Stevens, et al. v. Enron Corp. Savings Plan Administrative Committee, et al.,
C.A. No. 4:01-4208